SUPREME COURT, U. S.

FILED

JAN 19 1970

JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 1090

ARNOLD PAUL TRYON,
Appellant,

vs.

STATE OF IOWA,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF IOWA

JURISDICTIONAL STATEMENT

DONALD E. O'BRIEN of
O'BRIEN & GALVIN
916 Grandview Boulevard
Sioux City, Iowa 51103
Attorneys for Appellant

RICHARD C. TURNER
Attorney General, State of Iowa
State House
Des Moines, Iowa

MR. DAVID A. ELDERKIN
Assistant Attorney General
Attorneys for Appellee

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, HArrison 1-3030

INDEX

Jurisdictional Statement	1
Opinion Below	2
Jurisdiction	2
Questions Presented	3
Statutes Involved	3
Statement	3
The Questions Raised Are Substantial	5
Appendix A—Order for Hearing	A1
Appendix B—Pertinent Iowa Statutes	A2
Appendix C—Orders of Court and Pleadings	A2

Table of Cases

Booker v. *Fidelity Trust*, 263 U.S. 413, 44 S.Ct. 149	2
Brown v. *Allen*, 344 U.S. 433	6
Brown v. *Western R. of Alabama*, 338 U.S. 294	6
Country Club Tower v. *Tower Management*, 275 Fed. Supp. 468	2
Griffin v. *Illinois*, 351 U.S. 12	2, 5
Pearson v. *McGraw*, 60 S. Ct. 211, 86 P.2d 424, rehearing denied 87 P.2d 766	6
Perrott v. *City of Tallahasse*, 381 U.S. 19, 85 S. Ct. 1322	2

Statutes

Section 793.2, Iowa Code 1966	3
Section 793.4, Iowa Code 1966	3

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. .....

ARNOLD PAUL TRYON,
Appellant,

vs.

STATE OF IOWA,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF IOWA

JURISDICTIONAL STATEMENT

Appellant appeals from final order denying the application for a delayed appeal entered by the Supreme Court of Iowa on July 18, 1969, and submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINION BELOW

There is no opinion from the Supreme Court of Iowa. A copy of the final order entered by the Court is attached hereto as Appendix "A".

JURISDICTION

This suit arose out of the alleged failure of the appellant, after conviction, to give proper statutory Notice of Appeal as required by Sections 793.2 and 793.4 of the Code of Iowa, 1966, as amended. The Supreme Court of Iowa determined that the Notice of Appeal was faulty and dismissed the appeal and thereafter denied a request for a delayed appeal.

The final judgment of the Supreme Court of Iowa was entered on July 18, 1969, and the Notice of Appeal was filed on September 11, 1969.

The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, Section 1257 (2). The appellant respectfully requests the Court to treat this as a petition for Writ of Certiorari under Title 28, Section 1257 (3) if it is determined that it does not qualify for direct appeal under Section 1257 (2) as provided by Title 28, Section 2103.

The following decisions sustain the jurisdiction of the Supreme Court to review the judgment in this case:

Griffin v. *Illinois*, 351 U.S. 12.

Perrott v. *City of Tallahasse*, 381 U.S. 19, 85 S. Ct. 1322.

Country Club Tower v. *Tower Management*, 275 Fed. Sup. 468, citing *Booker* v. *Fidelity Trust*, 263 U.S. 413, 44 S. Ct. 149.

QUESTIONS PRESENTED

Are Sections 793.2 and 793.4 of the Code of Iowa, 1966, as amended, repugnant to the Constitution of the United States when strictly construed by the Supreme Court of Iowa to deprive this appellant to his right to appeal and be afforded due process?

STATUTES INVOLVED

Sections 793.2 and 793.4 of the Code of Iowa, 1966, as amended, are set forth in Appendix "B" hereto.

STATEMENT

Appellant was at the time of alleged offense, September 11, 1968, a citizen of the State of Iowa, residing near Spirit Lake, Iowa. He was charged with the crime of "Resisting Execution of Process," in violation of Section 742.1 of the Code of Iowa; that he pled not guilty to the charge and was tried by a jury and a verdict of guilty was returned on March 6, 1969; that on March 10, 1969, sentence was pronounced by the Court wherein the defendant was fined $200.00 plus the costs of the action; that after said sentencing, Arnold Paul Tryon advised his counsel that he desired to appeal the final judgment; counsel agreed that there was substance and merit to said appeal by reason of errors committed prior to and during the course of the trial and that the circumstances warranted the appeal.

That counsel for the appellant on March 12, 1969, attempted to effect a Notice of Appeal in the following words;

> "Comes now the defendant Arnold Paul Tryon, and in furtherance of Section 793.4 of the Code of Iowa (1966) hereby gives notice to the State of Iowa,

through the County Attorney of Dickinson County, of the taking of an appeal from the *jury verdict* in this Court."

That a motion to dismiss the appeal was filed on or about May 15, 1969. The gist of the motion was that the words "jury verdict" did not comply with the wording of Section 793.2; and on the same day, notice was given by the Iowa Supreme Court that said motion would be submitted to said Court without argument on June 9, 1969.

That thereafter, on June 6, 1969, this appellant filed a "Resistance to Motion to Dismiss" in the Iowa Supreme Court; that on June 9, 1969, the Iowa Supreme Court entered the following order "The Motion to Dismiss the above entitled appeal filed by the State of Iowa is sustained. Appeal dismissed."

Thereafter this appellant filed an "Application for Leave to Take Delayed Appeal and a Request for Leave to Present Oral Argument."

Resistance to said Application was filed by the appellee.

On July 18, 1969, oral argument before three Justices of the Iowa Supreme Court was had and summarily, after said arguments, the Court entered an Order denying the Application for Delayed Appeal.

That a timely "Notice of Appeal to the Supreme Court of the United States" was filed and a request was made by this appellant to the Clerk to transmit all pleadings filed in the Iowa Supreme Court to the Supreme Court of the United States.

That this was accomplished; that through inadvertence the said pleadings were returned to the Clerk of the Iowa Supreme Court who held them for a period; that this

situation was discovered by the appellant and the pleadings were subsequently returned to the Supreme Court of the United States and the appeal is now progressing.

That a temporary Stay of a hearing forfeiting the bond in this case has been granted by the Supreme Court of Iowa and is now in effect.

That copies of the "Notice of Appeal", "Motion to Dismiss", "Resistance to the Motion to Dismiss", "Order Dismissing Appeal", the "Application for Leave to Take Delayed Appeal", "Resistance to Application for Leave to Take Delayed Appeal" and the "Notice of Appeal to the Supreme Court of the United States" are attached hereto as Appendix "C".

THE QUESTIONS RAISED ARE SUBSTANTIAL

The issues in this appeal are substantial. Mr. Justice Frankfurter concurring in *Griffin* v. *Illinois*, 351 U.S. 12, at page 20, states, "The right to appeal from a conviction for crime is today so established that this leads to the easy assumption that it is fundamental to the protection of life and liberty and therefore a necessary ingredient of due process of law."

Justice Frankfurter, on page 21, recognizes that due process does not require a state to afford review of criminal judgments but says, "But neither the fact that a State may deny the right of appeal altogether nor the right of a State to make an appropriate classification, based on differences in crimes and their punishment, nor the right of a State to lay down conditions it deems appropriate for criminal appeals, sanctions differentiations by a State that have no relation to a rational policy of criminal appeal or authorizes the imposition of conditions that offend the deepest presuppositions of our society."

In *Pearson* v. *McGraw,* 60 S. Ct. 211, reversing *In re Hayes Estate,* 86 P.2d 424, rehearing denied 87 P.2d 766, the Court states, "Questions of due process are not to be treated narrowly or pedantically, in slavery to forms or phrases."

In *Brown* v. *Western R. of Alabama,* 338 U.S. 294, at page 296, it was argued that the State courts of Georgia were free to follow their own rules of "practice" and "procedure". The Court held, "The federal right to a trial cannot be defeated by forms of local practice."

In *Brown* v. *Allen,* 344 U.S. 433, the Court affirmed the Supreme Court of North Carolina holding that the petitioners had lost their right to review through failure to comply with the requirements of North Carolina law for perfecting an appeal in the Supreme Court of North Carolina. The appeal had been filed one day late.

Justice Frankfurter, in his dissent at page 577, decided that, "The legislature of North Carolina has vested in its judges an act so arbitrary and so cruel in its operation, considering that life is at stake, that in the circumstances of this case it constitutes a denial of due process in its rudimentary procedural aspect."

The questions raised are substantial. The ruling of the Iowa Supreme Court denies the appellant the right to appeal, not for something he did or failed to do, but because of a play on words which he had no control over.

Respectfully submitted,

O'BRIEN & GALVIN

By .....

DONALD E. O'BRIEN
916 Grandview Boulevard
Sioux City, Iowa
Attorneys for Appellant

APPENDIX

APPENDIX "B"

Section 793.2 of the Code of Iowa, 1966, states as follows:

793.2 Time of Taking—From Final Judgment Only.

An Appeal can only be taken from the final judgment, and within sixty days thereafter.

Section 793.4 of the Code of Iowa, 1966, states as follows:

793.4 Taking and Perfecting.

An appeal is taken and perfected by the party or his attorney serving on the adverse party or his attorney of record in the District Court at the time of the rendition of the judgment, a notice in writing of the taking of the appeal, and filing the same with such clerk, with evidence of service thereof indorsed thereon or annexed thereto.

APPENDIX "C"

IN THE DISTRICT COURT OF IOWA,
IN AND FOR DICKINSON COUNTY

STATE OF IOWA, Plaintiff, vs. ARNOLD PAUL TRYON, Defendant.	**No. 1985 Criminal**

Notice of Appeal

COMES NOW the defendant, Arnold Paul Tryon, and in furtherance of Section 793.4 of the Code of Iowa (1966) hereby gives notice to the State of Iowa, through the County Attorney of Dickinson County, of the taking of an appeal from the jury verdict rendered in this Court.

I hereby state that I have caused this Notice of Appeal to be filed with the Clerk of this Court and that I have caused a true copy of this Notice of Appeal to be served upon the County Attorney of Dickinson County.

O'Brien & Galvin
By /s/ Donald E. O'Brien
Donald E. O'Brien
916 Grandview Blvd.
Sioux City, Iowa
Attorneys for defendant

I hereby acknowledge receipt of the Notice of Appeal filed in this case.

/s/ David J. Stein
David J. Stein
County Attorney

IN THE SUPREME COURT OF IOWA

STATE OF IOWA,
Appellee,
vs.
ARNOLD PAUL TRYON,
Appellant.
Criminal No. .....

Motion to Dismiss

COMES NOW the appellee by its attorneys, Richard C. Turner, Attorney General of Iowa, and David A. Elderkin, Assistant Attorney General, and moves the Court to summarily dismiss the appeal in the above captioned case for the following reasons:

1. A jury verdict of guilty of the crime of resisting execution of process in violation of Section 742.1 of the 1966 Code of Iowa was returned against the defendant on March 6, 1969. Pursuant thereto final judgment of con-

viction was entered by the court on March 10, 1969. A purported notice of appeal was then prepared and signed by his attorney, Donald E. O'Brien of Sioux City, and filed with the Dickinson County District Court Clerk on March 12, 1969. It reads in pertinent part as follows:

> "COMES NOW the defendant, Arnold Paul Tryon, and in furtherance of Section 793.4 of the Code of Iowa (1966) hereby gives notice to the State of Iowa, through the County Attorney of Dickinson County, of the taking of an appeal from the jury verdict rendered in this Court."

2. Section 793.2 of the 1966 Code of Iowa provides that "An appeal can *only* be taken from the final judgment. . . ." As set forth in *State* v. *Klinger*, 259 Iowa 381, 144 N.W.2d 150, "final judgment" in a criminal case means the sentence; the sentence is the judgment. The verdict of the jury obviously is not the sentence and thus an appeal cannot be taken therefrom. 24 C.J.S., Criminal Law, §1653, and authorities cited. See *State* v. *Auman*, No. 53606, dismissed April 7, 1969; *State* v. *Bean*, No. 52955, dismissed May 5, 1969; *State* v. *Meyers*, No. 53614, dismissed May 5, 1969.

We therefore submit that this Court did not acquire jurisdiction of the instant purported appeal and we respectfully move that it be summarily dismissed.

Respectfully submitted,

Richard C. Turner
Attorney General of Iowa
By /s/ David A. Elderkin
Assistant Attorney General
State House, Des Moines, Iowa
Attorneys for Appellee

IN THE SUPREME COURT OF IOWA

STATE OF IOWA,
Appellee,
vs.
ARNOLD PAUL TRYON,
Appellant.

Criminal No. .....

Resistance to Motion to Dismiss

COMES NOW the appellant by his attorney Donald E. O'Brien of O'Brien and Galvin and in resistance to the Motion to Dismiss states as follows:

That this is a meritorious, active appeal; that the appellant strenuously desires to pursue this appeal.

The motion to dismiss proves only one thing; that is, that the attorney for the appellant used the wrong phrasing in the notice of appeal; the case was completed and sentence pronounced on the same day; this is in fact an appeal from the final judgment despite any erroneous use of words by the appellants attorney.

The case of *State* v. *Klinger*, 259 Iowa 381, 144 N.W.2d 150 is *not* in point.

There was no final judgment in this case, it was appealed on the defendants motion to suppress evidence made during pre trial proceedings and this Court held only that such a motion was not appealable.

This is not our case and the wording cited by the appellee from that case can not be controlling.

The C.J.S. (Criminal Law Section 1653,) does not fit our situation either. Looking first at C.J.S. Criminal Law Section 1648 at page 1001, it states,

> "It is a prerequisite of error or appeal that judgment be rendered and entered. Arnold Paul Tryon *did* have judgment rendered and entered against him."

At Section 1649, page 1004 of the same treatise, it states,

A sentence is ordinarily a prerequisite to an appeal. Arnold Paul Tryon the appellant *here* was sentenced.

This then brings us to Section 1653 at page 1014, relied on by the appellee, where it says,

"An appeal can not be taken from the verdict." This is true, we did not intend to appeal from the verdict and only appealed *after* judgment was entered and sentence pronounced.

There is at most here, a technical error, a misstatement in the notice by the appellants attorney. This is not fatal.

Section 793.18 of the Code of Iowa states,

> "If the appeal is taken by the defendant, the supreme court must examine the record, without regard to technical errors or defects, which do not affect the substantial rights of the parties, etc."

This is what should happen here. This appellant should not be barred by a technicality caused by his attorney.

In *Ford* v. *State*, 258 Iowa 137, 138 N.W. 2d 116, this Court said,

> "The defendant is entitled to an actual appellate determination of the merits of his original conviction according to the procedure prevailing in this state in ordinary cases."

I feel sure that this Court would not deny an appellant this right because of a "goof" by his attorney.

Respectfully submitted,

By /s/ Donald E. O'Brien
O'Brien and Galvin
916 Grandview Blvd.

IN THE SUPREME COURT OF IOWA

STATE OF IOWA, Appellee,
vs.
ARNOLD PAUL TRYON, Appellant.
No. 53584

Order

The motion to dismiss the above entitled appeal filed by the State of Iowa is sustained. Appeal dismissed.

Done this 9th day of June, 1969.

(Sgd.) T. G. Garfield
Chief Justice—Iowa Supreme Court

Copies mailed to Donald E. O'Brien, 916 Grandview Blvd., Sx. Cty. David A. Elderkin, Asst. Atty. General.

IN THE SUPREME COURT OF IOWA

STATE OF IOWA, Appellee,
vs.
ARNOLD PAUL TRYON, Appellant.
Criminal No. .....

Application for Leave to Take Delayed Appeal and Request for Leave to Present Oral Argument

COMES NOW Arnold Paul Tryon, Appellant, and respectfully makes application for leave to take a delayed appeal and further makes a request for leave to present oral argument.

In furtherance of this application, the Appellant sets out the following facts:

1) That Arnold Paul Tyron was charged by Information with the crime of resisting execution of process in violation of Section 742.1 of the Code of Iowa. That said charge was filed on the 11th day of September, 1968 in the District Court of Iowa in and for Dickinson County, at Spirit Lake, Iowa.

2) That he pled not guilty to the charge and was tried by a jury and a verdict of guilty was returned on March 6, 1969.

3) That on March 10, 1969, sentence was pronounced by the Court as follows: a fine of $200.00 plus the costs of this action.

> That at said time and place the defendant, Arnold Paul Tryon, advised his counsel that he desired to appeal the final judgment. Counsel agreed that there was substance and merit in such an appeal by reason of errors committed prior to and during the course of the trial and the circumstances warranted an appeal.

4) That counsel for Arnold Paul Tryon on March 12, 1969, attempted to effect a Notice of Appeal in the following words:

> "COMES NOW the defendant, Arnold Paul Tryon, and in furtherance of Section 793.4 of the Code of Iowa (1966) hereby gives notice to the State of Iowa, through the County Attorney of Dickinson County, of the taking of an appeal from the jury verdict in this Court."

5) That a motion to dismiss the appeal was filed on March 15, 1969, and on the same day notice was given by this Court that said motion would be submitted to the Court without argument on June 9, 1969.

6) That thereafter on June 6, 1969, this appellant filed a "Resistance to Motion to Dismiss" in this Court, a

copy of which is attached hereto marked Exhibit "A" and is by reference made a part hereof.

7) That on June 9, 1969, this Court entered the following Order, "The Motion to Dismiss the above entitled appeal filed by the State of Iowa is sustained. Appeal dismissed."

8) Counsel for the defendant-appellant, Arnold Paul Tryon, has good and sufficient cause to believe prejudicial error was committed and reasonable cause to believe an appeal would result in a reversal.

This situation has not arisen because of any dereliction or neglect by the defendant-appellant. In the interest of fairness and justice he should be accorded the right to appeal.

Respectfully a request for leave to present oral argument is hereby made.

The brief in the Resistance attached hereto is respectfully called to the Court's attention.

Respectfully submitted,

O'Brien & Galvin
By /s/ Donald E. O'Brien
Donald E. O'Brien
916 Grandview Blvd.
Sioux City, Iowa
Attorneys for Defendant-Appellant

The undersigned, Arnold Paul Tryon, appellant, states that the statements contained in this Application are true and correct and I hereby join in said application.

/s/ Arnold Paul Tryon
Arnold Paul Tryon

IN THE SUPREME COURT OF IOWA

STATE OF IOWA,

Appellee,

vs.

ARNOLD PAUL TRYON,

Appellant.

Criminal No. 53584

Resistance to Application for Leave to Take Delayed Appeal

COMES NOW the appellee by its attorneys, Richard C. Turner, Attorney General of Iowa, and David A. Elderkin, Assistant Attorney General, and makes resistance to appellant's Application for Leave to take Delayed Appeal as follows:

1. That defendant's Application is little more than a rehash of his resistance to our motion to dismiss the above entitled appeal which was sustained on June 9, 1969. No new arguments or authorities are presented and there is and has been no allegation that the defendant was prevented by a wrongful act or omission by the State from properly perfecting his notice of appeal. Our thoughts and authorities on the matter, including three recent appeals which were dismissed on the same ground as the instant case, were set forth in our aforementioned motion to dismiss and thus were before this Court for its consideration prior to the dismissal of the appeal. They need not be reiterated herein.

We therefore submit for the second time that an appeal cannot be taken from the verdict of the jury and we respectfully request that the instant Application be denied.

Respectfully submitted,

Richard C. Turner
Attorney General of Iowa
By /s/ David A. Elderkin
David A. Elderkin
Assistant Attorney General

IN THE SUPREME COURT OF IOWA

ARNOLD PAUL TRYON,
Appellant,
vs.
STATE OF IOWA,
Appellee.

Criminal No. 53584

Notice of Appeal to the Supreme Court of the United States

I. Notice is hereby given that Arnold Paul Tryon, the appellant above named, hereby appeals to the Supreme Court of the United States from the final order denying the application for a delayed appeal entered on the 18th day of July, 1969.

This appeal is taken pursuant to 28 USCA 1257 (2).

Appellant was convicted of the crime of resisting execution of process in violation of Section 742.1 of the Code of Iowa, 1966, as amended; was fined the sum of Two Hundred Dollars and costs and is presently enlarged on a bail in the sum of $1,000.00.

II. The clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

All filings including but not limited to pleadings, brief, and orders. It being understood that there is no transcript on file herein.

III. The following questions are presented by this appeal:

Can the Supreme Court of Iowa by strict, technical construction of Sections 793.2 and 793.4 of the Code of Iowa

deprive this appellant of his constitutional rights to appeal and be afforded due process.

O'Brien & Galvin
By /s/ Donald E. O'Brien
Donald E. O'Brien
916 Grandview Blvd.,
Sioux City, Iowa
Attorneys for Arnold Paul Tryon, Appellant

Record

There was no record in this cause except the orders of Court and pleadings attached to this Jurisdictional Statement; further the Clerk of the Supreme Court of Iowa has heretofore forwarded all said orders and pleadings to the Clerk of the Supreme Court of the United States.